NOT INCLUDED IN
BOUND VOLUMES

PJS
Cincinnati, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 265

and

HENKELS & MCCOY, INC. Case 09-CD-116000

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18

ORDER DENYING MOTIONS FOR RECONSIDERATION
AND TO REOPEN THE RECORD

On May 5, 2014, the National Labor Relations Board issued a Decision and Determination of Dispute[1] in this proceeding, finding that employees represented by Laborers International Union of North America, Local 265 (Laborers) are entitled to perform the service line work utilizing a miniexcavator (defined as a John Deere 35D or similar equipment) and skid steers by the Employer's service line crews working on the Duke Energy project in the Cincinnati, Ohio area. In its decision, the Board rejected a work preservation defense by International Union of Operating Engineers, Local 18 ("Operating Engineers") and found that the factors of employer preference, area and industry practice, and economy and efficiency of operations favored awarding the

[1] 360 NLRB No. 102.

disputed work to Laborers-represented employees.[2] On May 16, 2014, Operating Engineers filed motions for reconsideration and to reopen the record. On May 27, 2014, the Employer filed a memorandum in opposition to Operating Engineers' motions.

In its motions, Operating Engineers contends that the Board, in rejecting its work preservation defense, committed two material errors by: (1) failing to find that the hearing officer prejudiced it by sustaining an objection to questioning regarding whether the Employer's Labor Contracts Coordinator (Susan Gannon) believed that the Employer is bound to a successor collective-bargaining agreement, thereby foreclosing an "adoption by conduct" argument; and (2) improperly relying on hearsay evidence and misapplying Board precedent to find that the "real nature and origin of the dispute" was work acquisition, rather than work preservation. Operating Engineers also requests that the Board reopen the record to admit the May 5, 2014 Board certification of Operating Engineers as a collective-bargaining representative of "all full time operating engineers working for Henkels & McCoy, Inc., in Ohio and Kentucky under the terms of the Distribution and Maintenance Agreement which expired May 13, 2013…." According to Operating Engineers, the Board could not properly weigh the factors relevant to awarding disputed work without considering this "controlling" post-hearing certification.

Having duly considered the matter, we find no merit to Operating Engineers' arguments. First, because the Board considers the parties' conduct, not their subjective belief, in determining whether they are bound to a collective-bargaining agreement, Gannon's belief is irrelevant. See *Asbestos Workers Local No. 84 (DST Insulation,*

[2] The Board noted the parties' stipulation at the hearing that there were no Board certifications determining the collective-bargaining representative of the employees performing the work in dispute. The Board found that the Board certifications and past practice factors did not favor awarding the disputed work to either group of employees.

Inc.), 351 NLRB 19, 19 (2007) (the Board looks to "whether the party at issue has engaged in a course of conduct that manifests an intention to abide by the terms of the agreement").[3] Second, Operating Engineers' claim that the Board relied exclusively on hearsay evidence is untrue. The Board specifically noted Operating Engineers' representative Nate Brice's non-hearsay testimony in finding that "the origin of the dispute" arose when Operating Engineers claimed all of the disputed work (including that previously performed by Laborers-represented employees). 360 NLRB No. 102, slip op. at 2 fn. 5. Third, Operating Engineers' acknowledgement in its motions that it filed pay-in-lieu grievances even prior to the Employer's unilateral reassignment of the disputed work to Laborers-represented employees well supports the Board's finding that it claimed *all* of the work previously. Otherwise, Operating Engineers repeats the same arguments that the Board has previously considered and rejected, both in this case and other recent cases.[4]

We also find no merit to Operating Engineers' contention that the Board should reopen the record to admit the May 5, 2014 Board certification of Operating Engineers. The certification is neither "newly discovered" nor "previously unavailable evidence" because it did not exist at the time of the hearing. *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 fn. 1 (1990), overruled on other grounds by *Federal*

[3] Contrary to Operating Engineers' assertion, the record does not establish that the Employer was voluntarily paying wage rates and benefits pursuant to the new collective-bargaining agreement, which the Employer had not signed. Nor did the hearing officer err in limiting Gannon's testimony on this issue. Gannon testified that she never saw a new collective-bargaining agreement and did not know whether the Employer was paying the rates prevailing under the old or the new collective-bargaining agreement.

[4] See 360 NLRB No. 102, slip op. at 4 (citing cases holding that filing pay-in-lieu grievances may constitute a competing claim for work).

Security, Inc., 359 NLRB No. 1 (2012).[5] See also *Allis-Chalmers Corp.*, 286 NLRB 219 fn. 1 ("We deny the motion [to reopen the record] as it proffers evidence concerning an alleged event that occurred after the close of the hearing"). As the certification issued after the close of the hearing, it does not provide a basis for reopening the record.

For these reasons, we find that Operating Engineers' motions are lacking in merit and fail to present "extraordinary circumstances" warranting reconsideration or reopening of the record under the Board's Rules and Regulations.

IT IS ORDERED, therefore, that the Respondent's motions for reconsideration and to reopen the record are denied.

Dated, Washington, D.C., July, 14, 2014.

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Mark Gaston Pearce, Chairman

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Harry I. Johnson, III, Member

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Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[5] Operating Engineers cited no case where the Board gave controlling weight to a certification obtained after the close of the hearing. Moreover, it is significant that Operating Engineers' certification covers only operating engineers; it does not extend to laborers who also perform the disputed work. Further, any authority that Operating Engineers gained as a result of the certification extends only as far as the terms of the expired collective-bargaining agreement, an agreement which we have found is less specific than the Laborers' agreement in describing the disputed work. 360 NLRB No. 102, slip op. at 6.